IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REBECCA DOMINGUEZ, Successor of Mary Ellen Rubi, Widow of John F. Rubi Petitioners, v. BETHLEHEM STEEL CORPORATION and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents.	)	No. 18-70184

<u>DIRECTOR'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY VACATUR OR FURTHER EXTENSION TO FILE OPENING BRIEF</u>

The Director, Office of Workers' Compensation Programs, United States Department of Labor (Director), by counsel and pursuant to Federal Rules of Appellate Procedure (FRAP) Rule 27, hereby responds to Petitioner's motion for summary vacatur or further extension of the time to file her opening brief. The Director does not oppose Petitioner's request for

a third extension of time, allowing Petitioner an additional 14 days to file her opening brief.[1] He does, however, oppose her motion for summary vacatur.

Petitioner requests vacatur based on *Lucia v. Sec. and Exch. Comm'n*, 138 S.Ct. 2044, 2018 WL 3057893 (June 21, 2018), in which the Supreme Court held that the administrative law judges (ALJs) employed by the Securities and Exchange Commission (SEC) are inferior officers, and must therefore be appointed in conformity with the strictures of the Appointments Clause. Petitioner argues that William J. King, the Department of Labor ALJ who decided this case below, was not properly appointed, and thus *Lucia* requires the case to be remanded for a new hearing before a new, properly appointed, ALJ. As explained below, however, Petitioner waived that argument by failing to raise it before the agency, and her motion should, consequently, be denied.

BACKGROUND

This appeal stems from a claim for death benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*. (the Longshore Act). The ALJ denied the claim on the grounds that the injured employee's exposure to asbestos did not cause or contribute to his

[1] It appears that the filing of Petitioner's motion stays the briefing schedule in any event. Circuit Rule 27-11(a)(3) (schedule for briefing stayed upon the filing of a motion for full remand).

gastric cancer or hasten his death. The Petitioner appealed that decision to the Benefits Review Board, which affirmed the ALJ's decision. At no point during the administrative proceedings – before either the ALJ or the Board – did Petitioner raise the Appointments Clause issue.

ARGUMENT

I. Petitioner forfeited her Appointments Clause challenge by failing to raise the issue before the agency.

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Heads of Departments," or the "Courts of Law." U.S. Const. Art. II, sec. 2, cl. 2; *see Freytag v. Commissioner*, 501 U.S. 868 (1991); *Ryder v. United States*, 515 U.S. 177 (1995). Since 2000, litigants in administrative proceedings have raised Appointments Clause challenges to the appointments of ALJs who have overseen those proceedings. *Landry v. Federal Deposit Insurance Corporation*, 204 F.3d 1125, 1130 (D.C. Cir. 2000). The D.C. Circuit in *Landry* rejected an Appointments Clause challenge to the FDIC's ALJs, but the issue remained open in other circuits. In 2016, the Tenth Circuit held that the ALJs of the SEC were inferior officers who had not been appointed consistent with the Appointments Clause. *Bandimere v. Sec. and Exch. Comm'n*, 844 F.3d 1168, 1170 (10th Cir. 2016). The Supreme Court reached the same conclusion this year in *Lucia*, 138 S.Ct. 2044. Other litigants have raised

similar Appointments Clause challenges in agency proceedings and before the federal courts. *See, e.g.*, *Bennett v. Sec. and Exch. Comm'n*, No. 16-3827 (8th Cir.) (challenge to SEC ALJ); *Blackburn v. United States Dep't of Agriculture*, No. 17-4102 (6th Cir.) (challenge to USDA ALJ).

In *Lucia*, the Supreme Court explained that Appointments Clause challenges, no less than other arguments, must be timely raised, and are subject to forfeiture if not properly preserved. "[O]ne who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." *Lucia*, 138 S.Ct. at 2055 (emphasis added) (quotation marks omitted). The Supreme Court emphasized that Lucia was entitled to relief – a remand to the agency for a new hearing before a properly appointed officer – because he "made just such a timely challenge" and "contested the validity of [the ALJ's] appointment before the Commission." *Id.*

In stark contrast to Lucia, Bandimere, and the many other litigants who have properly raised and preserved Appointments Clause challenges in their administrative proceedings, Petitioner never raised an Appointments Clause challenge before the Department of Labor (DOL). From October 3, 2014, when Petitioner first requested an ALJ hearing, to December 2017, when the Benefits Review Board issued its final decision, Petitioner never

contested the ALJ's appointment. Instead, Petitioner raises the challenge for first time in this Court. That is too late. The Court should hold that Petitioner has forfeited its Appointments Clause claim at this late hour.[2]

This conclusion is a straightforward application of the fundamental tenet of administrative law that courts "should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *N.L.R.B. v. Southeast Ass'n for Retarded Citizens, Inc.*, 666 F.2d 428, 432 (9th Cir. 1982) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)); *see Inter-Tribal Council of Nevada v. U.S. Dept. of Labor*, 701 F.2d 770, 771 (9th Cir. 1983) (stating that "[a]ll issues which a party contests on appeal must be raised at the appropriate time under the agency practice," and holding that, because petitioner failed to raise issue of Secretary's authority to recoup allegedly misspent funds in either its pre-hearing statement or at the hearing before the ALJ, the Court could not consider that issue on appeal). For Longshore Act proceedings,

[2] The Director concedes that DOL ALJs are inferior officers and that the ALJ below was not properly appointed when he adjudicated the case. Thus, if the Court excuses Petitioner's waiver of its Appointments Clause challenge, she will be entitled to a new hearing before a different ALJ. *Lucia*, 138 S.Ct. at 2055.

all objections must be made to the Benefits Review Board before a court will consider them.[3] *Parker v. Motor Boat Sales, Inc*., 314 U.S. 244, 251 (1942) (employer's failure to raise issue of widow's capacity to file claim below waived);[4] *Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827 (9th Cir. 1981) (employer could not contest situs element of coverage under the Act where it had not raised the issue before the ALJ or challenged it on appeal to the Board); *Aetna Cas. & Sur. Co. v. Director, OWCP*, 97 F.3d 815 (5th Cir. 1996) (argument not raised before the Board, and raised for the first time on appeal, was waived); *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37 (1st Cir. 1982) (argument that worker had a pre-existing permanent total disability was not raised before the Board and was therefore waived). This same principle applies in cases under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, which are also heard by

[3] Petitioner did not raise its Appointments Clause challenge to either the ALJ or the Board. Although it arguably was required to apprise both tribunals, *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989) (issue raised for first time in appeal to the Board waived), the Court need not reach the issue because Petitioner failed to do even the bare minimum of raising the issue to the Board.

[4] When *Parker* was decided, deputy commissioners, rather than ALJs, conducted hearing in Longshore cases, and any party aggrieved by the deputy commissioner's decision could seek review in the U.S. district court. The underlying principle, however – that issues must be raised before the agency –remains the same.

the Board. *McConnell v. Director, OWCP,* 993 F.2d 1454, 1460 n.8 (10th Cir. 1993) (refusing to consider argument not raised before Board); *see also Micheli v. Director, OWCP,* 846 F.2d 632, 635 (10th Cir. 1988) (refusing to review ALJ's finding that was not appealed to Board); *accord Hix v. Director, OWCP,* 824 F.2d 526, 527 (6th Cir. 1987); *Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 220 (7th Cir. 1986); *Director, OWCP v. North American Coal Corp.,* 626 F.2d 1137, 1143-44 (3d Cir. 1980).

These principles apply with full force to arguments based on the Appointments Clause. The courts of appeals have consistently held that Appointments Clause challenges are "nonjurisdictional" and, thus, that a party may "forfeit[] its [Appointments Clause] argument by failing to raise it" at the appropriate time. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009); *see also In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (litigant forfeited Appointments Clause argument by failing to raise it before agency); *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional'") (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878-79 (1991)); *Evans v. Stephens*, 387 F.3d 1220, 1222 n.1 (11th Cir. 2004) (en banc) (constitutional challenge

to the recess appointment of an Eleventh Circuit judge was not jurisdictional question).

Petitioner's failure to present any Appointments Clause objection to the Benefits Review Board is quintessential forfeiture. There is no reason that she could not have timely raised a constitutional challenge during the administrative proceedings. The first Appointments Clause challenge to an agency ALJ was raised almost 20 years ago, *Landry*, 204 F.3d at 1130, and there was nothing that prevented Petitioner from timely raising a similar challenge to the ALJ here. Indeed, many similarly situated respondents in agency proceedings have timely raised Appointments Clause challenges. *See, e.g.*, *Lucia*, 138 S. Ct. at 2050 (petitioner raised Appointments Clause challenge before the agency); *Bandimere*, 844 F.3d at 1171 (same); *Landry*, 204 F.3d 1125, 1143 (D.C. Cir. 2000) (Randolph concurring) (describing same); *see also Ryder*, 515 U.S. at 179, 180-82 (1995) (describing timely Appointments Clause challenge raised before a military court, and contrasting it to other similar challenges that had not been timely raised).[5]

[5] Petitioner reads *Ryder* as permitting relief in cases where the Appointment Clause challenge is raised on "direct review," but not where it is a "collateral attack[] on a final decision[]." Motion at 3 n.2 (emphases omitted). *Ryder* makes no such distinction. Rather, the court emphasized "petitioner raised his objection to the judges' titles before those very judges and prior to their action on his case." 515 U.S. at 182. Moreover, at least two of the three cases *Ryder* distinguishes (as untimely and entitled to no relief) involved

The Supreme Court in *Freytag* chose to exercise its discretion to consider an Appointments Clause issue that had not been raised before the Tax Court, but emphasized that *Freytag* was a "rare case" and did not purport categorically to excuse petitioners from abiding by ordinary principles of appellate review in Appointments Clause cases. *Freytag*, 501 U.S. at 879 (noting that Appointments Clause challenges are "nonjurisdictional"); *id*. at 893-94 (Scalia, J., concurring) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review."). Indeed, *Lucia's* "timely challenge" prerequisite must be seen as cabining *Freytag*'s (or a court's) discretion and highlighting the exceptionality of the Court's review there.[6]

This case closely resembles the Supreme Court's 1952 decision in *L.A. Tucker Truck Lines*, 344 U.S. 33. There, the petitioner sought judicial

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what Petitioner defines as on "direct review." *See* 515 U.S. at 180-82 (distinguishing *Ball v. United States*, 140 U.S. 118, 123 (1891) (Appointment Clause objection made in motion to arrest of judgment); *McDowell v. United States*, 159 U.S. 596, 597 (1895) (same)); *see also U.S. v. Sisson*, 399 U.S. 267, 280-81 (1970) (explaining that "[a]rrest of judgment was the technical term describing the act of a trial judge refusing to enter judgment on the verdict because of an error appearing on the face of the record that rendered the judgment invalid").

[6] Petitioner quotes at length from *Freytag* while carefully excising the Court's conclusion that *Freytag* is the "rare case." Motion at 3 n.2. Petitioner also disregards *Lucia's* emphasis on a timely challenge and how that constrains *Freytag*.

review of a decision of the Interstate Commerce Commission (ICC). After never raising the issue before the agency, the petitioner argued for the first time on judicial review that the ICC hearing examiner – *i.e.*, the administrative law judge – who had conducted the initial administrative hearing had not been properly appointed under the Administrative Procedure Act (APA). *See L.A. Tucker*, 344 U.S. at 35. The district court accepted that argument and set aside the ICC's decision. *Id*. The Supreme Court recognized the merit in the petitioner's belated objection to the appointment of the ICC hearing examiner, 344 U.S. at 38, but nevertheless reversed because the petitioner had never raised the appointment issue before the ICC. Observing that "[t]he issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits," *id*. at 36, the Court held that the appointment issue was forfeited "in the absence of a timely objection" during the administrative proceeding, *id*. at 38.

The Federal Circuit has explained that a timeliness requirement for Appointments Clause challenges serves the same basic purposes underlying administrative exhaustion: "First, it gives [the] agency an opportunity to correct its own mistakes . . . before it is haled into federal court, and [thus] discourages disregard of [the agency's] procedures." *In re DBC* , 545 F.3d

at 1378 (internal quotations omitted). Second, "it promotes judicial efficiency, as [c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court." *Id.* at 1379 (quoting *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)). Both of those reasons apply here. If Petitioner had raised the Appointments Clause challenge during the administrative proceedings, the Secretary of Labor could well have ratified the prior appointment of the ALJs and provided for a new hearing before a properly appointed ALJ. But because Petitioner never raised the issue, the Secretary was never given an opportunity to consider and resolve it during the normal course of administrative proceedings.[7]

Moreover, considering Appointments Clause arguments raised for the first time on appeal "would encourage what Justice Scalia has referred to as sandbagging, *i.e.*, 'suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claiming that the course followed was reversible error.'" *In re DBC*, 545

[7] DOL has in fact addressed this issue. The Secretary ratified the prior appointments of agency ALJs "to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution." As Petitioner notes, however, the ALJ who decided this case had retired by the time those ratifications occurred, and was thus not included in the Secretary's ratifications.

F.3d at 1379 (quoting *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in the judgment)); *see also Stern v. Marshall*, 564 U.S. 462, 481-82 (2011) (explaining that "[w]e have recognized the value of waiver and forfeiture rules in complex cases," because "the consequences of a litigant sandbagging the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor – can be particularly severe" (internal quotation marks, alterations, and citations omitted)); *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086, 1088-89 (4th Cir. 1969) ("[O]rdinarily, a litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level.").

In sum, basic tenets of administrative law required Petitioner to raise its Appointments Clause challenge before the agency. Her proffered reasons for not doing so are meritless. The Court should therefore find that Petitioner forfeited her right to challenge the ALJ's authority under the Appointments Clause.

If the Court were to excuse Petitioner's forfeiture, it is critical to understand the scope and consequences of such a decision. There are

approximately 575 cases (both BLBA and Longshore Act with its extensions) currently pending at the Benefits Review Board. Of these, the Director is aware of 61 cases where an Appointments Clause challenge has been raised (and some these are cases where the challenge is untimely under Board practice). Should the Court excuse forfeiture here, it will set a precedent that every losing party at the Board (even those who have not timely raised the issue during years of administrative proceedings) can cite in seeking judicial reversal – and new proceedings before a different ALJ. (Here for instance, the claim was filed in June 2011, more than seven years ago.) It is not simply this case at stake, but hundreds of others, that could be upset on judicial review based on a claim that was never raised during the administrative proceedings. That is precisely the kind of disruption that forfeiture seeks to avoid.[8] *L.A. Tucker*, 344 U.S. at 37 ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

WHEREFORE, the Director respectfully requests that the Court deny Petitioner's motion to summarily vacate the decisions below.

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[8] By contrast, the parties in *Ryder* agreed that the defective appointments would affect only between 7 to 10 pending cases. 515 U.S. at 185.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2018, I electronically filed the foregoing Response through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE